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Office of the General Counsel

February 17, 2012

To: John Auerbach, Commissioner  
DPH Bureau Directors

From: Donna E. Levin, General Counsel  
Lisa Snellings, Deputy General Counsel

Re: Remote Participation at Meetings Subject to Open Meeting Law

The Attorney General's Office promulgated a regulation (940 CMR 29.10) effective November 11, 2011 describing requirements for remote participation by members at meetings subject to the OML. This memo outlines steps a DPH public body should take if they choose to allow remote participation by its members.

"Remote Participation" means participation by a member of a public body during a meeting of that public body where the member is not physically present at the meeting location. The Attorney General strongly encourages members of public bodies to physically attend meetings whenever possible. Members of public bodies have a responsibility to ensure that remote participation is not used in a way that would defeat the purposes of the Open Meeting Law, namely promoting transparency with regard to deliberations and decisions on which public policy is based.

(1) Adoption of Remote Participation by Public Body. A DPH public body may, by a simple majority vote, authorize remote participation by its members, in accordance with the requirements of the regulations, at all subsequent meetings of that public body.

(a) The meeting agenda should indicate that the issue of remote participation will be discussed and voted upon.

(b) A public body is not required to allow remote participation by its members, and is allowed to prohibit or impose conditions or restrictions on remote participation by members. For example, a public body could require members to attend a majority of meetings in person.

- (c) The public body shall determine which of the acceptable methods for remote participation may be used by its members.
- (d) Following discussion of the regulatory requirements for remote participation, the public body may vote to approve a resolution with wording such as:

*[Insert name of public body] hereby approves, by simple majority vote, the use of remote participation by members at all subsequent meetings, in accordance with the requirements of the Open Meeting Law regulation, 940 CMR 29.10. In addition to those requirements, [insert name of public body] hereby requires [describe additional conditions or restrictions on the use of remote participation.] The following are acceptable methods of remote participation: [list acceptable method – see below] This action may be revoked by simple majority vote at a duly noticed meeting.*

- (2) The Chair Must Authorize Remote Participation by a Member(s) at a Particular Meeting. If the public body votes to allow remote participation, a member(s) who wishes to participate remotely shall, as soon as reasonably possible prior to a meeting, notify the chair or, in the chair's absence, the person chairing the meeting, of the member's desire to participate remotely and the reason for and facts supporting the request.

The chair must determine that one or more of the following factors makes the member's physical attendance at the meeting "unreasonably difficult":

- (a) Personal illness;
- (b) Personal disability<sup>1</sup>;
- (c) Emergency;
- (d) Military service; or
- (e) Geographic distance<sup>2</sup>.

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<sup>1</sup> All open meetings of public bodies must be accessible to persons with disabilities. Meeting locations must be accessible by wheelchair, without the need for special assistance. Sign language interpreters for deaf or hearing-impaired persons must be provided, subject to reasonable advance notice. The DPH Office of General Counsel and the Attorney General's Disability Rights Project are available to answer questions about accessibility. A member's physical disability should not, as a general rule, prevent the member's in person participation in meetings. Accommodations must be made for any public body member who requires TTY service, video relay service, or other form of adaptive telecommunications.

<sup>2</sup> The Chair must determine that geographic distance makes personal attendance by the member "unreasonably difficult." A public body should make every effort to select members for whom

(3) Procedures for Remote Participation at a Meeting

- (a) At the start of the meeting, the chair shall announce the name of any member who will be participating remotely and the reason under 940 CMR 29.10(5) for the member's remote participation. The chair's statement does not need to contain any detail about the reason for the member's remote participation other than the section of the regulations that justifies it. This information must be recorded in the meeting minutes.
- (b) A quorum of the body, including the chair or, in the chair's absence, the person authorized to chair the meeting, shall be physically present at the meeting location, as required by M.G.L. c. 30A, sec 20(d);
- (c) Members of public bodies who participate remotely may vote and shall not be deemed absent for the purposes of M.G.L. c. 39, sec. 23D.
- (d) All votes taken during any meeting in which a member participates remotely shall be by roll call vote.
- (e) At an open session of the public body, non-board members may be present with the member at the remote location.
- (f) Before going into executive session, the member must state that no other person is present or able to hear the discussion at the remote location. However, the public body may vote to allow a non-member to be present during an executive session at the remote location.
- (g) When feasible, the chair or, in the chair's absence, the person chairing the meeting, shall distribute to remote participants in advance of the meeting, copies of any documents or exhibits that he or she reasonably anticipates will be used during the meeting.<sup>3</sup> If used during the meeting, such documents shall be part of the official record of the meeting, and shall be listed in the meeting minutes and retained in accordance with M.G.L. c. 30A, sec. 22.

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geographic distance does not make in person participation at all meetings "unreasonably difficult."

<sup>3</sup> As a reminder, DPH Confidentiality Procedures generally prohibit transmitting confidential information electronically, including by email. In order to transmit confidential information electronically to members of public bodies, including those participating remotely in meetings, a waiver must be obtained pursuant to Confidentiality Procedure 10A available at:  
<http://www.mass.gov/eohhs/docs/dph/privacy/mdph-confidentiality-procedures.pdf>

(4) Technology for Remote Participation

- (a) Members of a public body who participate remotely and all persons present at the meeting location shall be clearly audible to each other. When video technology is in use, the remote participant must be clearly visible to all persons present in the meeting location.
- (b) The following media are acceptable methods for remote participation. Remote participation by any other means is not permitted. The public body shall determine which of the acceptable methods may be used by its members.
  - (i) telephone, internet, or satellite enabled audio or video conferencing;
  - (ii) any other technology that enables the remote participant and all persons present at the meeting location to be clearly audible to one another. Text messaging, instant messaging, email and webchat without audio are not acceptable methods of remote participation.
- (c) The chair or, in the chair's absence, the person chairing the meeting, may decide how to address technical difficulties that arise as a result of utilizing remote participation, but is encouraged, wherever possible, to suspend discussion while reasonable efforts are made to correct any problem that interferes with a remote participant's ability to hear or be heard clearly by all persons present at the meeting location. If technical difficulties result in a remote participant being disconnected from the meeting, that fact and the time at which the disconnection occurred shall be noted in the meeting minutes.

For more information about the OML – including the definition of “public body” subject to the OML – please refer to the Attorney General’s “Guide to the Open Meeting Law” at <http://www.mass.gov/ago/docs/government/2012-2-10-oml-guide.pdf> or consult the appropriate program attorney in the Office of General Counsel.